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Class Action Issues To Watch In High Court TransUnion Case

By **Archis Parasharami and Carmen Longoria-Green** (April 13, 2021, 11:13 AM EDT)

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On March 30, the U.S. Supreme Court heard oral argument in TransUnion LLC v. Ramirez, a Fair Credit Reporting Act case in which a federal court entered a classwide judgment against TransUnion for two practices it had ended years ago.

The case is one to watch: It has potentially enormous significance for class action litigation in federal courts.

There are two key issues in the case:

1. Can a risk of harm — as opposed to actual harm — confer Article III standing on all members of a class when the challenged policy has ended and the risk never materialized for the overwhelming majority of the class? And, if so, how much of a risk is needed?

2. Can a class representative satisfy the typicality requirement of Federal Rule of Civil Procedure 23(a) when he experienced a distinct and exceptionally severe injury as compared to other class members?

The justices asked difficult questions of both the parties and the Office of the Solicitor General, which participated in the argument as an amicus curiae supporting the plaintiff on the question of standing but suggesting that the case be remanded to the U.S. Court of Appeals for the Ninth Circuit to reconsider the typicality question.

Although some observers believed that the court would focus its attention chiefly on typicality — which is the position the Solicitor General's Office urged — the argument suggested that the justices are just as, if not more, focused on the question of Article III standing.

The Oral Argument

As background, this case involves allegations regarding TransUnion's practice of noting on credit reports whether individuals share their first and last name with someone on the U.S. Department of the Treasury's Office of Foreign Assets Control list.

That list includes individuals that the U.S. government has identified as suspected terrorists and narcotics traffickers with whom U.S. companies are forbidden to do business.

Respondent Sergio Ramirez shares his first and last name with someone on this list, and due to the OFAC alert on his TransUnion credit report, was unable to purchase a car, was humiliated in front of his wife and father-in-law, and canceled an upcoming vacation because he feared being on the OFAC list would make traveling difficult.

The U.S. District Court for the Northern District of California appointed Ramirez to represent a class of all individuals who received a letter from TransUnion alerting them that an OFAC alert was on their credit report.

It is undisputed that TransUnion did not disseminate credit reports for 6,332 of the 8,185 class members, meaning that while these class members were at a theoretical risk of having the OFAC notation shared with third parties, that risk never materialized.

At oral argument, the justices focused most of their questions on when and how a risk of harm — as opposed to actual harm — can amount to an injury in fact sufficient to confer standing.

As the court had explained in its 2016 decision in Spokeo Inc. v. Robins, "a bare procedural violation" of a statute like FCRA, which was also at issue in Spokeo, is not sufficiently concrete to satisfy Article III's requirements when the violation is "divorced from any concrete harm."

But a statutory violation that results in a "risk of real harm" — or, as the court said elsewhere in the opinion, a "material risk of harm" — can be an injury in fact. Spokeo left what exactly constitutes a sufficient risk of harm for another day.

In TransUnion, two discrete aspects of what counts as a "material risk of harm" have taken center stage.

First, because this case is a class action, it presents a unique question that would not be present in an individual action: Some absent members of the class who were not actually harmed may not even have been aware of the risk of harm because they would not have known that an OFAC alert was on their credit report.

Second, because TransUnion has since changed its practices and because 6,332 of the class members never had their credit report disseminated, any risk of harm that might have previously existed had, by the time of final judgment, dissipated entirely.

Justice Neil Gorsuch tackled the first issue in an exchange with TransUnion's counsel, remarking that "in order to have emotional distress" from a risk of harm, "you have to have knowledge of the thing that would cause the emotional distress."

Counsel agreed and argued that risk unaccompanied by emotional distress could rarely serve as an injury in fact; the risk would have to be quite high, approaching near certainty, and the potential harm far more serious than an incorrect credit report.

Justice Samuel Alito, meanwhile, recalled the court's admonition in Spokeo that injuries in fact should have a common law analogue, and wondered whether there was any common law analogue where an unknown risk of harm was actionable.

Justice Elena Kagan addressed the second aspect. Suppose, she asked TransUnion's counsel, that we learn there is a carcinogen in certain water that, if consumed, has a 50% chance of causing cancer within five years. If Congress created a cause of action, coupled with statutory damages, for anyone exposed to that water, would those individuals have standing?

TransUnion's counsel replied that they would until the five years had expired — because a 50% chance of developing cancer is a significant risk — but once the five-year period had elapsed, those who had not developed cancer would no longer have standing because their risk had dissipated.

Justice Kagan replied that she found that "interesting," because "if you're willing to give me that everybody has standing within the five years, it should be that everybody has standing in the sixth year as well, because you have standing if you suffered harm in the past."

In partial response to that point, Justice Amy Coney Barrett remarked later in the argument that if an injury — such as risk of harm — existed at one point, but later evaporates, the case likely cannot move forward, but courts would call that a mootness problem, as opposed to standing.

Chief Justice John Roberts pushed Ramirez's counsel on this point as well, asking him whether, rather than bringing a lawsuit, litigants should feel grateful to have avoided harm when they learn they were exposed to a risk that never materialized.

The chief justice also attempted to find an outer limit to Ramirez's standing theory. Suppose, he asked Ramirez's counsel, "Congress creates a cause of action for statutory damages for anyone driving within a quarter mile of a drunk driver." Would Article III allow someone to bring a claim under this provision if, several days later and long after the risk had passed, she finds out a drunk driver had been nearby?

Ramirez's counsel replied that it would — essentially conceding that his client's theory of standing would authorize lawsuits over statutory violations that could never result in actual harm nor a known risk of harm.

As counsel for TransUnion pointed out in rebuttal, if Ramirez's theory were correct, "everybody [could] bring actions for traffic violations that didn't actually [result in] any harm." That result would open Article III courts "to all sorts of trivial injuries," when people should actually be "toasting their good luck, not suing the person who posed a risk to them, but didn't actually injure them."

The question of typicality received far less attention. Justices Stephen Breyer and Sonia Sotomayor in particular expressed doubt that Ramirez was atypical within the meaning of Rule 23.

They expressed the belief that any unfairness caused by his testimony at trial should have been remedied by objecting to his testimony, countering it with testimony from absent class members — something that defendants will fasten on in future class action trials — or using a verdict form that would allow for different statutory damages awards.

The other justices paid comparatively less attention to the typicality issue. Despite that, the lawyer arguing for the Solicitor General's Office made a powerful case for why Ramirez was an atypical class representative, explaining that whether a representative's claim was typical of the class includes evaluating the representative's injury.

Further, the lawyer argued that having Ramirez testify about his unusually severe injury told the jury a story that was not "indicative of what happened to other class members," who "might benefit from that" — when the jury awarded statutory damages — "in a way that they really shouldn't."

Final Thoughts

The justices asked hard questions to counsel for the parties and the Solicitor General's Office, making it difficult to predict how the court will rule.

But, at a minimum, the court seems poised to confirm that all members of a class — not just the named representative — must have Article III standing to obtain a damages judgment in their favor. In fact, the respondent conceded as much. Members of the court will likely also use this case as an opportunity to clarify its prior holding in Spokeo that a bare violation of a statute, without other accompanying harm, is not an injury in fact.

As for the other questions raised by this case, it is hard to deny that Ramirez himself experienced a real harm — certainly enough to open the doors to federal court. But the same cannot be said of the many thousands of class members who never had their credit reports disseminated and thus suffered nothing more than a bare procedural violation — which, under Spokeo, is insufficient to confer standing.

Indeed, Ramirez's theory would open the floodgates to all sorts of claims, including ones where the plaintiff had neither been harmed by a statutory violation nor was even aware of any possible risk of harm to himself or herself.

That limitless theory of jurisdiction seems antithetical to Article III's requirement that the federal courts can hear only cases involving injuries that are, as Spokeo said, "concrete" and "real."

In light of that, court observers will certainly be watching for the TransUnion decision with interest.

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Disclosure: Mayer Brown, including author Parasharami, represented Spokeo in Spokeo v. Robins. Both authors filed an amicus brief in support of TransUnion.